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No. 95 - 1694

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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This Court granted review to decide

> [w]hether an entity, *which otherwise would be considered part of the State or an "arm of the State" and thereby immune from suit in federal court under the Eleventh Amendment*, may lose its immunity where it has a claim for reimbursement or indemnity from the federal government or other third party.

Pet. i (emphasis added). That question has divided the courts of appeals. *See* Pet. 9-21. Well over half of respondents' brief on the merits is devoted to other issues, including: (1) whether the Court should reconsider the test for determining "arm of the State" status, Resp. Br. 16-28; (2) whether the University is an arm of the State of California, *id.* at 32-42; (3) whether the University has waived Eleventh Amendment immunity, *id.* at 29-32; and (4) whether Doe has a valid claim under federal law, *id.* at 42-47. Respondents' brief ignores this Court's Rule 14.1(a), which requires the parties to "focus on the questions the Court has viewed as particularly important," rather than "fill[ing] their limited briefing space . . . with discussion of issues other than the one on which certiorari was granted." *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992). Moreover, as discussed below (*infra* pp. 7-19), the additional issues raised by respondents lack merit.

I. ELEVENTH AMENDMENT IMMUNITY DOES NOT TURN ON WHETHER A STATE ENTITY HAS A CLAIM FOR INDEMNIFICATION OR REIMBURSEMENT AGAINST A THIRD PARTY.

A. Respondents' Argument Is Contrary To Basic Eleventh Amendment Principles.

Respondents contend (Resp. Br. 5-16) that the University is not entitled to Eleventh Amendment immunity in this case because any judgment rendered against the University "would be paid fully and directly by the United States Department of Energy" (DOE). Resp. Br. 5. As petitioners' opening brief explains (Pet. Br. 12-35), however, a State or State entity that otherwise is entitled to Eleventh Amendment immunity does not lose that immunity in a particular case even if the plaintiff

were able to establish that the State has a claim for indemnification or reimbursement against a third party.[1]

First, the Eleventh Amendment confers immunity from suit, not merely protection against the financial impact of money judgments. Consequently, the Eleventh Amendment bars suits in federal court against unconsenting States even if the plaintiff seeks no money judgment at all. *See Cory v. White*, 457 U.S. 85, 90-91 (1982). It follows that the Eleventh Amendment bars suits seeking money judgments against unconsenting States, without regard to whether the State has a claim for indemnification or reimbursement.

Second, notwithstanding the University's claim for indemnification, Respondent Doe's suit subjects the University to the coercive process of the federal courts. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996). Doe has sued the University, not the federal government; if Doe were to prevail, he would be entitled to execute his judgment against the University, not the United States. *See* J.A. 21a (Canby, dissenting).

Third, Doe has asked the federal court to enter "an Order for specific performance requiring . . . [the University] to employ Plaintiff Doe . . .." J.A. 52a. The University would be required to carry out such an order even if a money judgment were paid in full by the federal government. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (suit is barred if "judgment sought would

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[1] As the Solicitor General observes (U.S. Br. 15 n.10), the panel majority's reasoning would permit a suit against the State, as well as a State entity, whenever a federal court concluded that a judgment against the State is likely to be paid by a third party. Moreover, the panel majority's approach permits plaintiffs (including respondent Doe) to bring state-law claims against State entities under the federal court's diversity jurisdiction. *See* Pet. Br. 15 n.8.

expend itself on the public treasury or domain" *or* "restrain the Government from acting, *or* . . . compel it to act") (emphasis added; internal quotation and citations omitted).

Respondents overstate the facts in asserting (Resp. Br. 7) that "there is not even the potential for state funding" of a judgment against the University. The indemnity agreement between the DOE and the University, although "relatively clear," J.A. 22a (Canby, J., dissenting), contains significant exceptions. The DOE is not obligated to indemnify the University if it concludes that the judgment was "caused directly by bad faith or willful misconduct" by an officer of the University or the Laboratory Director, J.A. 77a, and the DOE's obligation to the University is "subject to the availability of funds appropriated from time to time by Congress," J.A. 78a. The Solicitor General states (U.S. Br. 7) that "DOE has not determined whether or not it is contractually obligated to pay the costs of any judgment that may be entered against the University in this case."

Respondents emphasize (Resp. Br. 9-10) that the University would not be required to advance State funds to pay a judgment, because it could pay the judgment with federal funds through an "advanced funding" mechanism. U.S. Br. 4. The fact remains, however, that if the DOE were subsequently to determine that the judgment is not an allowable cost, the University would be required to pay the judgment out of State funds. As the Solicitor General observes (U.S. Br. 25), "under elementary principles of *res judicata*, a determination that the federal government is contractually obligated to provide indemnification would not be binding on the United States." U.S. Br. 25.

Respondents insist that this case is "primarily a federal civil rights action" rather than a contract action. Resp. Br. 1. Contrary to respondents' contention (Resp. Br. 42-47), it is well-settled that the Eleventh Amendment applies equally to

federal question and diversity jurisdiction. *See Seminole Tribe*, 116 S. Ct. at 1122. Furthermore, the *only* claim that Doe has pursued on appeal against the University is a State-law contract claim, and Doe has stated that he will remain in federal court only if he can pursue his contract claim. *See* J.A. 38a-40a.[2]

B. The Panel Majority's Approach Would Require Extensive Case-By-Case Inquiries Into A State Entity's Finances To Decide Claims Of Eleventh Amendment Immunity.

Petitioners' opening brief shows (Pet. Br. 28-35) that the Court of Appeals' approach would require burdensome discovery and mini-trials to decide the threshold issue of Eleventh Amendment immunity. *See also* U.S. Br. 22-25 (panel majority's approach requires federal courts to resolve "potentially complex and fact-intensive issues of indemnification coverage" at the outset of litigation).

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[2] Respondents' federal law claims lack merit. An applicant for employment, unlike a tenured employee, generally has no protected property interest under the Due Process Clause. *See Board of Regents v. Roth*, 408 U.S. 564, 576 (1972) (due process protects only "interests that a person has already acquired in specific benefits"). Although Doe alleges that he has a protected interest in the form of contractual rights, the availability of a State-law action for breach of contract satisfies the requirements of due process. *Cf. Ingraham v. Wright*, 430 U.S. 651, 678-80 (1977). A different approach would convert garden-variety breach of contract claims into constitutional cases. *See generally Bishop v. Wood*, 426 U.S. 341, 349 (1976) ("federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies"); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 230 (1985) (Powell, J., concurring) ("[j]udicial review of academic decisions . . . is rarely appropriate"). Finally, neither Executive Order No. 10865 nor 10 C.F.R. Part 710 gives rise to an enforceable right to challenge a government contractor's decision not to hire an applicant for employment.

Respondents' proposal (Resp. Br. 28-29) to "minimize" these difficulties by adopting three new procedural rules in Eleventh Amendment cases is without merit.

Two of respondents' three proposed "rules" merely impose *additional* restrictions on States, and so cannot possibly be regarded as protecting the States' dignitary interests.[3] Respondents' third proposal is that the defendant be required to make a "minimal" showing in support of its claim to Eleventh Amendment immunity, after which a plaintiff would be required to obtain information about the entity's finances from public sources if possible. Respondents' own description of this proposal reveals its emptiness: If the state entity "does not cooperate fully in producing the requested documents," then the plaintiff would be entitled to "discovery of the entity's finances, including the production of relevant documents," and an order to compel production "if the entity resists." Resp. Br. 29.

In short, making Eleventh Amendment immunity turn on a prediction about the financial impact of a particular judgment is inconsistent with this Court's recognition that claims of Eleventh Amendment immunity should not "implicate[ ] any extraordinary factual difficulty." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.* ("*PRASA*"), 506 U.S. 139, 147 (1993). To make such a prediction, federal courts would be compelled to engage in a "detailed audit of the defendant's finances." *Paschal v. Jackson*, 936 F.2d 940, 944 (7th Cir. 1991), *cert. denied sub nom. Paschal v. Didrickson*, 502 U.S. 1081 (1992). Subjecting States to "detailed audits" to decide the threshold

[3] Doe proposes (Resp. Br. 28-29) that a State be required to raise an Eleventh Amendment immunity claim within 30 days after the complaint is served, and also be required, as a prerequisite to raising a claim of Eleventh Amendment immunity, to waive any statute of limitations defense it may have to a subsequent action in State court.

immunity question hardly "ensur[es] that the States' dignitary interests [are] fully vindicated." *PRASA*, 506 U.S. at 146.

II. THE ADDITIONAL ARGUMENTS RAISED IN RESPONDENTS' BRIEF DO NOT SUPPORT THE COURT OF APPEALS' DECISION.

A. The University Of California Is An "Arm Of The State."

Respondents argue at length (Resp. Br. 16-42) that the University is not an arm of the State of California, and therefore is not "otherwise" entitled to Eleventh Amendment immunity even in the absence of a contractual right to indemnification. As the panel majority recognized (J.A. 17a), however, courts have uniformly held that the University is a State entity for Eleventh Amendment purposes.[4] These precedents are consistent with many other decisions holding that State universities are entitled to Eleventh Amendment immunity.[5] The Court of Appeals did not question these decisions, but instead distinguished them solely on the ground that "in this specific instance," a money judgment most likely would be paid by the DOE. J.A. 18a. Accordingly, rejecting

[4] *See Mascheroni v. Board of Regents of the Univ. of Cal.*, 28 F.3d 1554, 1559 (10th Cir. 1994); *Armstrong v. Meyers*, 964 F.2d 948, 949-50 (9th Cir. 1992); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989); *BV Eng'g v. Univ. of Cal.*, 858 F.2d 1394, 1395 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982); *In re Holoholo*, 512 F. Supp. 889, 895 (D. Haw. 1981); *Vaughn v. Regents of the Univ. of Cal.*, 504 F. Supp. 1349, 1351-54 (E.D. Cal. 1981); *Selman v. Harvard Med. Sch.*, 494 F. Supp. 603, 615 (S.D.N.Y.), *aff'd w'out opinion*, 636 F.2d 1204 (2d Cir. 1980).

[5] *See* Pet. Br. 13 n.6 (collecting authorities); Knivila, Note, *Public Universities and the Eleventh Amendment*, 78 Geo. L.J. 1723, 1746-51 (1990) (same).

this ground of decision, as petitioners urge, would suffice to justify reversal of the Court of Appeals' decision.

In asking the Court to take up a hitherto unraised question and to hold that the University is not an arm of the State, respondents also ask the Court to announce a general test for determining "arm of the State" status. *See* Resp. Br. 16-28. Disposition of this case does not require any such disquisition. For even if the question were properly raised, the University is an arm of the State under any reasonable approach to determining arm-of-the-State status. In petitioners' view, however, it is sufficient for Eleventh Amendment purposes that the University (1) is treated under State law as a co-equal branch of State government, (2) pursues the important State objectives of providing public higher education and supporting research, and (3) is governed by a body composed almost entirely of elected State officials and appointees of the Governor confirmed by the State Senate. *Cf. Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 974 (1995) ([W]here government "creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.").

1. Under California Law, The University Is A Branch Of State Government.

Under California law, the University is "'a branch of the state government equal and coordinate with the Legislature, the judiciary, and the executive.'" J.A. 16a, *quoting* 30 *Ops. Cal. Atty. Gen.* 162, 166 (1957).[6] The Board of Regents, the

[6] The California Constitution provides:

"The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and for other [specified purposes]."

Cal. Const., art. IX, § 9(a).

University's governing body, is composed of: (1) seven *ex officio* members, including the Governor, Lieutenant Governor, Speaker of the Assembly, and Superintendent of Public Instruction (an elected official); and (2) 18 members appointed by the Governor and approved by the State Senate. Cal. Const., art. IX, § 9(a). The California courts "clearly recognize[ ] the University as a branch of the state government." J.A. 16a, *citing Regents of the Univ. of Cal. v. City of Santa Monica*, 143 Cal. Rptr. 276, 279 (Cal. Ct. App. 1978) (University is "a constitutionally created arm of the state"); *Ishimatsu v. Regents of the Univ. of Cal.*, 72 Cal. Rptr 756, 763 (Cal. Ct. App. 1968) (University is "a statewide administrative agency"). *See also Penington v. Bonelli*, 59 P.2d 448, 450 (Cal. Dist. Ct. App. 1936) (University is "a branch of the state itself").[7]

In *Hamilton v. Regents of the University of California*, 293 U.S. 245, 258 (1934), this Court held that the Regents exercise "state law-making power," such that an order of the Regents is the equivalent of a "statute of [the] State" of California. The Court concluded that "by the California constitution the regents are, with exceptions not material here, fully empowered in respect of the organization and government of the university, which, as it has been held, is a constitutional department or function of the state government."

[7] As an arm of the State, the University is exempt from local regulation, *Regents v. Santa Monica*, 143 Cal. Rptr. at 279-80, and local taxation, Cal. Educ. Code § 92443, and possesses the power of eminent domain, *id.* § 92439.

Id. at 257, *citing Williams v. Wheeler*, 138 P. 937 (Cal. 1913); *Wallace v. Regents*, 242 P. 892 (Cal. 1925).[8]

Respondents' argument rests on a fundamentally flawed premise — that the University is too "independent" of the elected branches of State government to warrant protection under the Eleventh Amendment. Resp. Br. 32-42. The Eleventh Amendment is not a constitutional straitjacket that applies only when the States adhere to a single rigid model for structuring State government. While the California Constitution grants the University considerable autonomy from the other branches of State government,[9] California's long-standing and much-commended policy of removing governance of the University from the partisan arena does not make the University any less an arm of the State. *See* Knivila, Note, *Public Universities and the Eleventh Amendment*, 78 Geo. L.J. 1723, 1742 (1990) ("Properly viewed," autonomy of state university "strongly weigh[s] in favor of . . . finding that the university is an arm of the state"). The University's status within the California government is analogous to that of the Judicial Branch, or an "independent" agency such as the Securities and Exchange Commission. Courts and independent agencies enjoy substantial independence from the

[8] Although *Hamilton* was not an Eleventh Amendment case, the Court's holding that the Board of Regents exercises a portion of the State's "law-making power" plainly is indicative of the University's status under the Eleventh Amendment.

[9] *See generally* Scully, Note, *Autonomy and Accountability: The University of California and the State Constitution*, 38 Hastings L.J. 927 (1987); Harold W. Horowitz, *The Autonomy of the University of California Under the State Constitution*, 25 UCLA L. Rev. 23 (1977).

political branches of government, yet that does not make them — or the University — any less a part of the government.[10]

Furthermore, respondents' hyperbolic statement (Resp. Br. 41), that if the University "had any more autonomy, it would be a private entity," ignores the important connections between the State's elected officials and the University. The State's three senior elected officials are *ex officio* voting members of the Regents, and the Governor traditionally serves as its Chairman. Eighteen of the 21 Regents who are not themselves elected officials are appointed by the Governor and approved by the California Senate. In addition, the University is dependent on appropriations by the Legislature, and the University's handling of public funds is subject to "legislative scrutiny" and auditing by State officials. *California State Employees Ass'n v. Flournoy*, 108 Cal. Rptr. 251, 262 (Ct. App. 1973) (*quoting* 3 *Ops. Cal. Atty. Gen.* 108, 109 (1944)), *cert. denied*, 414 U.S. 1093 (1973); *see also* Cal. Govt. Code § 13294. California's elected officials thus clearly "retain[] a measure of control" over the University. *Vaughn v. Regents of the Univ. of Cal.*, 504 F. Supp. 1349, 1353 (E.D. Cal. 1981).

2. *Hess* Supports The Conclusion That The University Is A State Entity.

This Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), much relied on by respondents, rests on the conclusion that Compact Clause entities "occupy a significantly different position in our federal

[10] Respondents' argument points to the conclusion that independent federal agencies are not part of the federal government, because their decisions are not directly controlled by elected officials. Actually, independent federal agencies such as the SEC may be viewed as subject to *less* control by elected officials than the University, because no elected official is a voting member of the SEC.

system than do the States themselves." *Id.* at 400. "Compact Clause entities owe their existence to state and federal sovereigns acting cooperatively, and not to any 'one of the United States.'" *Id.* at 401 (quoting U.S. Const., amend. XI). Consequently, the Court concluded that suit in federal court is neither "an affront to the dignity of a Compact Clause entity" nor a threat to "the integrity of the compacting States." 115 S. Ct. at 400. Notwithstanding that conclusion, the Court proceeded to consider whether the constituent States were financially responsible for the compact entity's operations, for in that event "the vulnerability of the State's purse" would have entitled the Compact Clause entity to the immunity available to its constituent States. *Id.* at 404.

In *Hess*, the Court withheld Eleventh Amendment immunity from the Port Authority Trans-Hudson Corporation ("PATH"), based on PATH's "long history of paying its own way," in contrast to entities that depend on appropriations from State revenues to meet their operating budgets. 115 S. Ct. at 405. *See also* Resp. Br. 20 (issue is whether entity is "self-sufficient or otherwise financially independent of the state"). This analysis supports affording Eleventh Amendment immunity to the University.

The California Constitution provides that public support of the University "[f]rom all state revenues" is a "first" priority of the Legislature. Cal. Const. art. XVI, § 8(a). In accordance with that provision, the University receives very large unrestricted appropriations from general State revenues.[11] The University depends on regular infusions of general State revenues to carry out its mission. *See Flournoy*,

[11] In the fiscal year ending June 30, 1992, the University's consolidated budget of $9.8 billion included more than $2.2 billion in funds appropriated by the Legislature out of the state's general revenues. *See* 9th Cir. Pet. for Rehearing, App. at 208.

108 Cal. Rptr. at 261 (University is "dependent upon legislative appropriations of tax revenues"). The University is thus quite different from PATH, which was "[c]onceived as a fiscally independent entity" and "for decades has received no money from the States." *Hess*, 115 S. Ct. at 403. Because the University is not "structured to be self-sustaining," but rather is "constantly dependent on funds" appropriated by the State Legislature, judgments against the University, "as a practical matter," will expend themselves against the State treasury. 115 S. Ct. at 405. *See also id.* at 410 (O'Connor, J., dissenting) ("Court *is* entirely right . . . to suggest that the Eleventh Amendment confers immunity over entities whose liabilities are funded by state taxpayer dollars" (emphasis in original)); *Selman*, 494 F. Supp. at 615 ("any damage claim resulting from a lawsuit" against the University would be paid "from public funds").

Furthermore, *all* funds of the University — whether derived from general tax revenues or from other sources such as tuition, grants, and investment income — are State funds. Under California law, "[a]ll [the University's] property is property of the state." *In re Royer's Estate*, 56 P. 461, 463 (Cal. 1899); *see also In re Bacon*, 49 Cal. Rptr. 322, 329 (Cal. Ct. App. 1966); *Vaughn*, 504 F. Supp. at 1353 (judgment against the University must be paid out of "the state treasury or other sources of *state* funds" (emphasis in original)). As the court explained in *Vaughn*, the Eleventh Amendment is not limited to cases where a judgment would be paid "literally out of the general treasury," but also applies to cases in which payment would be made from other "state-held funds." *Id.* at n.5 (citations omitted).

3. A "Functional Analysis" Also Supports The Conclusion That The University Is A State Entity.

Respondents urge (Resp. Br. 25-28) the Court to engage in a "functional" analysis, but this type of analysis does not provide a basis for sustaining the decision of the panel majority. By statute, the University is entrusted with primary state-wide responsibility for "state-supported academic . . . research." Cal. Educ. Code § 66010.4(c) (West Supp. 1996). It has exclusive authority over public education in law, medicine, and certain other professions, and has "sole authority . . . to award the doctoral degree in all fields of learning," except by agreement with the California State University. *Id.* As the panel majority recognized, "[t]he regulation of public education is an important central government function." J.A. 16a. *See also Vaughn*, 504 F. Supp. at 1353 ("Regents perform the essential governmental function of providing the citizens of the State of California with a higher education").

Respondents argue, however (Resp. Br. 25-28), that courts should analyze the University's functions on a piecemeal basis. Even the panel majority rejected that argument, concluding that it should "look at the overall function of the University and not merely to the specific function it performs in relation to the Laboratory." J.A. 15a (citation omitted). Respondents' "disaggregation of functions" approach would permit plaintiffs to engage in endless litigation over Eleventh Amendment immunity by arguing that even if the University as a whole is a State entity, some aspect of its activities (*e.g.*, athletic activities, textbook sales, food service, operation of parking lots) is not a governmental function. To be sure, an entity's activities may develop and change over time, so that a reexamination of the entity's Eleventh Amendment status is warranted. But such a reexamination, if warranted, must consider the entity as a whole. *See Kroll v.*

Board of Trustees of Univ. of Ill., 934 F.2d 904, 908 n.3 (7th Cir. 1991)[12]

Respondents also urge the Court to withhold immunity on the ground that the University's activities at the Lawrence Livermore National Laboratory are "commercial" rather than "governmental" in nature. In a related constitutional context, the Court has recognized that this distinction is "untenable" and lacks "principled content." *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 543, 583 (1984). In any event, the Laboratories engage in scientific research — surely a core function of a university. Although the research activity is funded by the federal government, much research activity in public universities is funded by outside sources. *See generally* Clark Kerr, *The Uses of the University* (4th ed. 1995).

4. Respondents' Other Arguments Do Not Alter The Conclusion That The University Is A State Entity.

Respondents incorrectly assert (Resp. Br. 36-40) that the University "is not cloaked with the sovereign immunity of the State of California." *Id.* at 40. California law expressly provides that the Board of Regents is a "public entity" that cannot be sued absent a waiver of sovereign immunity. *See* Cal. Govt. Code §§ 811.2, 815. Respondents and their *amicus* rely (Resp. Br. 33-35; Hunter Br. 5-6) on provisions of State law that exempt the University from procedures for presenting tort claims that apply to other State agencies. *See id.* §§ 900.6, 905.6, 943, 965.9. According to respondents

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[12] *In re Holoholo*, 512 F. Supp. 889, 895 (D. Haw. 1981), relied on by respondents, affords no support for their approach. In *Holoholo*, the court held that the University "is the state for purposes of the Eleventh Amendment," but (erroneously) found a contractual waiver of Eleventh Amendment immunity.

(Resp. Br. 35), these provisions show that the University should be treated "the same as a private corporation" for Eleventh Amendment purposes. But the fact that the University, unlike other State agencies, is exempt from the requirements that tort claims must be presented to the State Controller, and paid only upon a warrant issued by the Controller, reflects the University's special status as a co-equal branch of State government. As the comments to the provisions explain, they merely "codif[y] existing law as declared by two trial court decisions which, the Commission is advised, held that neither the State nor the local public entity claims presentation procedures apply to claims against the University of California." *Id.* § 905.6 (comment).[13] *Cf. id.* § 925.2 (exempting claims for expenses of members of the State Legislature from claims presentation procedure).

The cases that respondents cite concern the applicability of particular State laws to the University, not whether it is protected by sovereign immunity. In *Regents of the University of California v. Superior Court*, 551 P.2d 844, 846 (Cal. 1976) (*en banc*), for example, which held that the University is subject to State usury laws in managing its endowment fund, the court applied a general rule that "governmental agencies" — including State agencies — are excluded "from the operation of general statutory provisions only if their inclusion would result in an infringement upon sovereign governmental powers." By contrast, in *San Francisco Labor Council v. Regents of the University of California*, 608 P.2d 277 (Cal. 1980) (*en banc*), the court held that a State prevailing wage law does not apply to the University. The

[13] *See Regents of the Univ. of Cal. v. January*, 6 P. 376 (Cal. 1885) (State treasurer required to deliver funds deposited in the State treasury upon presentation of resolution of the Regents, "without requiring, in addition thereto, a warrant of the comptroller."); *Regents v. Dunn*, 6 P. 377 (Cal. 1885) (same).

court, which repeatedly referred to the University as a "state agenc[y]," reasoned that "[t]he Regents have the general rule-making or policy-making power in regard to the University" under the State's Constitution, and therefore have a "general immunity from legislative regulation." *Id.* at 278 (citations omitted).[14]

Respondents also argue (Resp. Br. 35) that the University is equivalent to a county or city, and therefore not entitled to Eleventh Amendment immunity. The short answer is that California law expressly distinguishes the University from counties and cities, *see* Cal. Govt. Code § 3202 ("'State agency' means every state office, department, division, bureau, board, commission, superior court, court of appeal, the Supreme Court, the California State University, the University of California, and the Legislature."; "'Local agency' means a county [or] city . . . ."), and many provisions of California law expressly define the University as a State

[14] *Regents of the University of California v. Aubry*, 49 Cal. Rptr. 2d 703, 708 (Cal. Ct. App. 1996), simply followed *San Francisco Labor Council*. *Royer's Estate*, an early case, concluded (56 P. at 463) that the University, although "a governmental agency" and an "instrumentality of the state," is subject to the State's probate laws. Respondents also cite *Moores v. Walsh*, 45 Cal. Rptr. 2d 389, 390 (Cal. Ct. App. 1995), apparently because it notes in passing that real property was conveyed from the State to the Regents. Although the Regents may hold title to property of the University, all University property is property of the State. *See Royer's Estate*, 56 P. at 463. Finally, *Regents v. Public Employment Relations Board*, 485 U.S. 589, 591 (1988), has nothing to do with the status of the University. The issue was whether delivery of unstamped letters from a labor union to university employees violates Private Express Statutes. The same type of suit could have been brought if any branch or agency of the California government had delivered unstamped letters to its employees.

agency.[15] In *Moor v. County of Alameda*, 411 U.S. 693 (1973), which held that California counties are citizens of California for purposes of federal diversity jurisdiction, the Court found it "significant[]" that a county, unlike the University, "is deemed to be a 'local public entity' in contrast to the State and state agencies." *Id.* at 719, *citing* Cal. Govt. Code § 940.4. In addition, the Court noted that a county, unlike the University, is "authorized to levy taxes to pay . . . judgments" against it. *Id.* Finally, members of a county's governing body are not chosen in state-wide elections or appointed by the Governor.

In sum, the treatment of the University under State law and in State court decisions is fully consistent with the University's position as an arm of the State for Eleventh Amendment purposes.

B. The University Has Not Waived Eleventh Amendment Immunity.

Respondents contend (Resp. Br. 29-32) that the University has waived Eleventh Amendment immunity by entering into the DOE contract and by "freely submitt[ing] to discovery for almost one year." Resp. Br. 31. The Court of Appeals did not reach this issue, *see* J.A. 18a; in any event, it lacks merit. A waiver of Eleventh Amendment immunity will be found

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[15] *See, e.g.*, Cal. Govt. Code §§ 19994.30(c), 13332.11(a), 8790.20(g); 8680.8, 8547.2(d), 6901, 4475, 3202; Cal. Bus. & Prof. Code § 11010.6; Cal. Food & Agric. Code §§ 74195, 74695, 74995, 75655, 78004; Cal. Health & Safety Code 16104; Cal. Pub. Cont. Code, ch. 2.1; 63 *Ops. Cal. Atty. Gen.* 132 (1980). *Cf.* Cal. Govt. Code § 11346.3(b)(2) (excluding the University, the courts, and agencies in the judicial or legislative branch of state government); *id.* § 11346.54 (same); *id.* § 11011.13 (excluding the University, the Legislature, and the Department of Transportation). *See also Regents v. Superior Court of Los Angeles County*, 476 P.2d 457, 464 n.14 (Cal. 1970) (*en banc*) (Board of Regents does not "occupy a position analogous" to that of a county).

"only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), *quoting Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). The University-DOE contract plainly does not meet that demanding standard. To the contrary, the University's limited agreement not to assert an immunity defense "[i]n the event of a nuclear incident," J.A. 72a, clearly implies that it has *not* waived Eleventh Amendment immunity in this case. It is also well-established that Eleventh Amendment immunity is a jurisdictional issue that can be raised at any point in the litigation. *Edelman*, 415 U.S. at 677-78.

C. Doe May Not Pursue An Action For Damages Against Petitioner Nuckolls In His Official Capacity.

Finally, Doe argues (Resp. Br. 47-48) that his claim against Petitioner Nuckolls in his official capacity may proceed "independent of the Eleventh Amendment issue." The Court of Appeals' ruling that the Section 1983 claim against Petitioner Nuckolls could go forward was based solely on its conclusion (J.A. 19a) that the University is not entitled to Eleventh Amendment immunity in this case. Accordingly, if the Court holds that the University is entitled to Eleventh Amendment protection, the Court of Appeals' ruling on the Section 1983 claim against Petitioner Nuckolls should also be reversed. Although the Court of Appeals did not reach Doe's contention that he is seeking "prospective injunctive relief," J.A. 19a, the District Court correctly rejected that contention on the ground that Doe's Section 1983 claim "relates solely to an alleged past violation of federal law," J.A. 34a-35a (quotation omitted). *See Papasan v. Allain*, 478 U.S. 265, 278-79 (1986).

CONCLUSION

For the foregoing reasons, and those stated in petitioners' opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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